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No. 81-2302

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ANTHONY I. GIACOBBE,

Appellant,

—against—

CARL ANDREWS, PEDRO S. CONDERO and BENJAMIN TERRES,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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Question Presented

Whether the at large councilmanic system mandated by Section 22(b) of the New York City Charter, which allocates an equal number of at large Council seats to each of the City's five boroughs, without regard to vast population disparities among the boroughs, violates the one person one vote rule of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

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ANTHONY I. GIACOBBE,

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—against—

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
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MOTION TO AFFIRM

Appellees Carl Andrews, Pedro S. Cordero and Benjamin Tenzer move, pursuant to Supreme Court Rule 16(1)(c),* for an order affirming the unanimous judgment of the Second Circuit Court of Appeals on the ground that the question is so unsubstantial as not to deserve further argument.

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* If, for any reason, this Court considers this motion on grounds other than Rule 16(1)(c) Appellees move, in the alternative, for an order dismissing the appeal pursuant to Rule 16(1)(a), or in the further alternative, submit this brief in opposition to a grant of *certiorari*. Cf. 28 U.S.C. §2103.

Statement of the Case

Plaintiffs' complaint stated eight causes of action.* The first, at issue on this appeal, alleged that §22(b) of the New York City Charter violates the one person one vote rule as embodied in the Equal Protection Clause of the Fourteenth Amendment. On November 17, 1981, the District Court granted plaintiffs' motion for summary judgment on the first cause of action. All defendants** and intervenors appealed.

The Court of Appeals unanimously affirmed the District Court on March 16, 1982, the day after oral argument. The defendant City of New York, and defendants Edward I. Koch, Mayor of the City of New York, Thomas J. Cuite, Majority Leader of the City Council, Melvin Markus, Chairman of the City Council Redistricting Committee, the Board of Elections of the City of New York, and three intervenors below (Boyce, Miller and Stern) have all determined not to appeal. Intervenor-Appellant Anthony I. Giacobbe, at large Council member from Staten Island, stands alone in insisting on Supreme Court review.

The Court of Appeals affirmed the District Court on the basis of the lower court's opinion. The District Court found that, even utilizing the most conservative method of computation, the total percentage deviation from population equality for the New York City Council was 50.4%. (App.

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* This Court has once before addressed this action. On September 8, 1981, plaintiffs (Appellees here) obtained an order, based on §5 of the Voting Rights Act, 42 U.S.C. §1973(c), enjoining the elections in New York City scheduled for September 10. On September 9, defendants sought review in the United States Supreme Court, which unanimously refused to stay the injunction. No. A-218.

** Except City Council President Carol Bellamy, who determined not to appeal even the District Court opinion.

16).* Neither this Court nor any other court has ever countenanced a percentage deviation even approaching the magnitude of that involved here. Because no state justification —much less those proffered by the appellant—could justify the vast discrepancies at issue here, the motion to affirm should be granted.

ARGUMENT

POINT I

Section 22 of the New York City Charter Violates the *Reynolds* Rule of One Person One Vote.

Legislative districts, including local legislative districts,** must be apportioned on a population basis; failure to do so constitutes a violation of the Fourteenth Amendment. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). "The conception of political equality . . . can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963). The determination of whether an apportionment scheme meets the *Reynolds* rule of population equality "requires a quantitative analysis." *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1158 (5th Cir. 1981).

As the focus of analysis shifts from Congressional districts to local legislative districts, courts have tolerated slightly greater deviations from population equality. "Mathematical exactness is not required." *Reynolds, supra*, at 569. Yet even with this flexible approach, "a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted

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* All references to "App. ——" refer to the given page of the Appendix filed with the Appellant's Jurisdictional Statement.

** *Avery* v. *Midland County*, 390 U.S. 474 (1968).

to emasculate the goal of substantial equality." *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973). The populations of the at large districts under scrutiny here are not substantially equal. No sleight of hand can render the population of Brooklyn—2,230,936—and the population of Staten Island —352,131—substantially equal.

While this Court has never drawn a bright line standard beyond which no apportionment scheme may legally venture, the parameters of acceptability have been delineated by the case law. Thus, the highest percentage deviation* from population equality in a state legislative scheme ever upheld by the Supreme Court was 16.4% in *Mahan* v. *Howell, supra*, where Justice Rehnquist suggested that such a figure "may well approach tolerable limits." 410 U.S. at 329. *See, e.g., Gaffney* v. *Cummings*, 412 U.S. 735 (1973) (7.83% total percentage deviation approved); *White* v. *Regester*, 412 U.S. 755 (1973) (9.9% deviation approved); *Connor* v. *Finch*, 431 U.S. 407 (1977) (16.5% and 19.3% disapproved); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) (24.78% and 28.2% disapproved); *Swann* v. *Adams*, 385 U.S. 440 (1967) (25.65% disapproved); *see also Cosner* v. *Dalton*, 522 F. Supp. 350 (E.D.Va. 1981).

As recognized by both courts below, the case most directly relevant is *Abate* v. *Mundt*, 403 U.S. 182 (1971), where this

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* In *Abate* v. *Mundt*, 403 U.S. 182 (1971), the formula for determining percentage deviations was described as follows:

> For purposes of comparison as to representation between the districts a determination of the ideal representation can be computed by dividing the total population by the number of legislators, resulting in an ideal representation per legislator. . . . This figure of ideal representation can then be compared with the actual representation for each legislator to determine the extent of over and under representation.

Petitioner's Brief to the Supreme Court in *Abate* v. *Mundt*, at 4-5, accepted by the Court *sub silentio*.

Court approved an 11.9% percentage deviation for the county legislature of Rockland County, New York. That decision properly assessed the flexibility to be granted local governments:

> In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, *Sailors* v. *Board of Education*, 387 U.S. 105, 110-111 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. *Reynolds* v. *Sims*, *supra* at 578. These observations . . . lend support to the argument that *slightly greater percentage deviations may be tolerable* for local government apportionment schemes, cf. *ibid.* Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community may sometimes justify departures from *strict equality*. Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors. . . .

403 U.S. at 185-86 (emphasis added).

Yet, the New York City Council scheme mandated by the City Charter grants disproportionate representation to certain geographic areas; solely on the basis of residence, the voters of Staten Island have a disproportionately strong voice, at the expense of voters of the more populous bor-

oughs. The 50.4% percentage deviation at issue here is more than four times that "guardedly sanctioned in *Abate*" (App. 19) and is more than three times that found to "approach tolerable limits" in *Mahan*. The disproportionate representation mandated by Section 22 of the New York City Charter so far exceeds constitutional limits that the question appealed is unsubstantial and does not merit further argument.

POINT II

Appellant's Proffered Justifications Impermissibly Emasculate the *Reynolds* Rule.

Each of the alleged justifications urged by the Intervenor-Appellant was considered, and rejected, by both the District Court and Court of Appeals. None of the proffered rationales justifies a deviation from population equality that is facially unconstitutional.

In *Cosner* v. *Dalton*, 522 F. Supp. 350 (E.D.Va. 1981) (three-judge court) the reapportionment plan for the Virginia House of Delegates had, depending on the method of calculation, maximum percentage deviations ranging from 22.13% to 25.72%. *Id.* at 355-56. The Virginia defendants, like defendants here, attempted to justify their plan by urging the compelling nature of local policies, including retention of existing districts, incumbency concerns, natural communities of interest, and preservation of local subdivisions.

The *Cosner* court held, in part, that the Virginia plan was *facially* unconstitutional:

> At one time or another, the Supreme Court has expressly or tacitly recognized that most of the policies

> considered by Virginia permit deviation from strict numerical equality. The Court has never held, however, that these state interests, though legitimate, may be aggregated to justify population variances as large as those disclosed by the Virginia Act. . . . Guided by the precepts that the Supreme Court has explained in the cases we have cited, we conclude that the [Virginia reapportionment] is *facially unconstitutional* because the deviation among the populations of the districts exceeds the limits tolerated by the Equal Protection Clause.

Id. at 357-58 (emphasis added). If 25.72% deviation from population equality is facially unconstitutional, *a fortiori*, 50.4% deviation is unconstitutional.

This Court has already rejected other justifications urged by the appellant. Appellant's attempt to legitimate §22 of the Charter by reference to the public referendum which endorsed the at large system is misplaced. "The fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause. . . ." * *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 737 (1964).

Appellant's analysis of how political outcomes and legislative coalitions would (or would not) be modified by invalidation of the at large regime is similarly meritless. Whether Staten Island councilmembers can impose their political will on others is an irrelevant consideration. "Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional mus-

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* See also the cases cited in POINT I, *supra*, and the accompanying percentage deviation data.

ter." *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 533 (1969). The *Kirkpatrick* Court squarely rejected the notion that "considerations of practical politics can justify population disparities." *Id.* at 534.

Finally, appellant's continued reliance on *Blaikie* v. *Wagner*, 258 F. Supp. 364 (S.D.N.Y. 1965) (three-judge court) demonstrates how far appellant must strain to justify his appeal. In 1965, the *Blaikie* court did not have the benefit of modern Supreme Court learning, "which has been considerably refined since . . ." *Whitcomb* v. *Chavis*, 403 U.S. 124, 163 (1971). One of the primary refinements has been meticulous attention to quantitative data demonstrating the total "percentage deviation" from population equality. It is now clear that a quantitative analysis is required. *Wyche*, *supra*, at 1159. Yet *Blaikie* is entirely silent as to the pertinent percentage deviations involved. Moreover, the *Blaikie* court accorded great weight to considerations which are improper under a modern *Reynolds* analysis. The machinations of hypothetical coalitions are, under contemporary legal teaching, irrelevant. Attempting to count votes, or to assess legislative majorities, is neither the proper role for a court nor a proper analysis under the one person one vote rule. *Kirkpatrick*, *supra*.

Both the District Court and the Court of Appeals rejected the *Blaikie* analysis. One measure of that case's lack of persuasive force is that in the sixteen years since it was decided, *Blaikie* has been cited by other courts only three times, and not once within the last decade. By omitting any reference to *Blaikie* during that decade, courts have clearly assessed that case's proper place in the annals of reapportionment law. Appellant cannot seriously contend that the *Blaikie* case could be decided and upheld today on the basis of the opinion which it inspired in 1965.

The *Reynolds* Court offers the dispositive response to today's lonely appellant:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566.

Appellees respectfully submit that this Court can answer no differently.

CONCLUSION

The percentage deviation here—50.4%—is more than three times greater than that ever sanctioned by the Supreme Court, even according the locality flexibility to account for "the particular circumstances and needs of [the] local community." The percentage deviation here is more than twice that held to be *facially* unconstitutional. Appellant has failed to present a substantial question for review in this Court. The motion to affirm should be granted.

Dated: New York, New York
July 8, 1982

Respectfully submitted,

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